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No. 85-82

IN THE
Supreme Court of the United States
OCTOBER TERM, 1985

BUILDING & CONSTRUCTION TRADES COUNCIL OF PHILADELPHIA AND VICINITY, *et al.*,
Petitioners,

v.

ALTEMOSE CONSTRUCTION COMPANY AND CHAMBER OF COMMERCE OF THE UNITED STATES,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Third Circuit

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PETITIONERS' REPLY BRIEF

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PETITIONERS' REPLY BRIEF*

ARGUMENT

In this reply we discuss in order the responses to question 1 presented by the petition (which raises a question concerning the labor exemption to the antitrust laws); question 2 (which raises a question concerning the standards to be applied by the courts in ruling on motions for summary judgment in antitrust cases where the showing of a conspiracy is a necessary element of the plaintiff's case); and question 3 (which raises a question con-

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* Throughout this brief "Pet." will refer to the petition for certiorari herein; "App." will refer to the separately bound appendix thereto; "Alt. Br." will refer to the brief in opposition of respondent Altemose Construction Company; and "COC Mem." will refer to the memorandum of respondent Chamber of Commerce of the United States in partial support and partial opposition.

cerning the collateral estoppel effect of decisions of the National Labor Relations Board).

I.

Altemose correctly observes, "The major difference between Count I and II, as recognized by the Third Circuit, is the lack of participation by non-union entities in a conspiracy having secondary effects (App. 11a)" (Alt. Br. 13), and contends that this very distinction "demonstrates that petitioners' [first] question does not require this Court's attention" (*id.*). But there can be no doubt that the Third Circuit's reinstatement of Count II despite the absence therein of any allegation of a union-non-labor group conspiracy squarely raises the question of whether such an allegation (and proof thereof) is critical to Altemose's anti-trust claim. And this aspect of the Third Circuit's decision is plainly inconsistent with this Court's precedents under which the availability of the statutory labor exemption from the anti-trust laws depends on whether the unions are acting unilaterally or in combination with a non-labor group. See Pet. 12-18, to which Altemose does not respond.

The court of appeals did not seek to justify its ruling on Count II on any finding that the defendant unions were not acting in their self-interest, or that the plaintiffs had raised a substantial question of fact as to whether the unions were so acting.[1] Nevertheless, in order to argue that the first question is not presented by the pleadings here Altemose seeks to inject the self-interest issue into the case:

> * * * [T]he elimination of the non-union entries from the conspiracy among unions to engage in secondary

[1] No plausible argument can be made that it is not in the unions' interest to have available work performed by employers with whom the unions have collective bargaining agreements; indeed, this is essential to preserve the job opportunities and labor standards of the unions' members.

> activities does not invoke the protection of the statutory exemption. When unions do not act in their *legitimate* self-interest, they are subject to the restraints of the antitrust laws. See *United Mine Workers v. Pennington*, 381 U.S. 657, 662 (1965); *United States v. Hutcheson*, 312 U.S. 219, 232 (1941). [Alt. Br. 13-14, emphasis added]

Altemose's assertion that the statutory labor exemption requires the unions to prove the legitimacy of their unilateral actions is belied by the very passage from *Hutcheson*, reaffirmed in *Pennington*, which Altemose cites:

> So long as a union acts in its self-interest and does not combine with non-labor groups, the licit and the illicit under § 20 *are not to be distinguished by any judgment regarding the wisdom or unwisdom, the rightness or wrongness, the selfishness or unselfishness of the end of which the particular union activities are the means.* [312 U.S. at 232; 381 U.S. at 662, our emphasis.]

The holding was again reiterated in *H. A. Artists & Associates v. Actor's Equity Assn.*, 451 U.S. 704, 715 set forth at Pet. 13. Thus, while it is true that the exemption is available only if the union is acting in its self-interest, the legitimacy of that self-interest is not open to question in determining whether the union is exempt from the antitrust laws, although, of course, the legitimacy of those actions may be questioned under other laws.

When Altemose finally does reach the merits of the statutory exemption issue the company seeks to equate this case and *Connell Co. v. Plumbers & Steamfitters*, 421 U.S. 616 (Alt. Br. 14-15). Altemose observes that the "only divergence of the facts supporting Count II and those in *Connell* is that Altemose (unlike the contractor in *Connell*) refused to sign the subcontractors' agreement. * * *" (*id.* at 15), and asserts "as the Circuit properly concluded, the refusal to sign an unlawful agreement does not deprive Altemose of the protection of the antitrust

law or clothe the unions' activities to make Altemose sign with the shield of the statutory exemption" (*id.*).

We have shown at Pet. 16-18 that the absence of an agreement between Altemose and the defendants is of controlling significance for purposes of the statutory exemption and that insofar as the court of appeals was of the opposite view that court misread *Connell*. Again, Altemose makes no response to the analysis in our petition.

Indeed, even respondent Chamber of Commerce does not contend that *Connell* decided the statutory exemption issue presented by question No. 1 in the petition. The Chamber acknowledges that "the application of the statutory exemptions to Count II * * * is an issue never directly addressed by this Court and only arguably considered by the Court in *Connell Construction Co.* * * * (COC Mem. 13), and represents that that issue is one "of major importance affecting Chamber members throughout the country," (*id.*). Accordingly, the Chamber urges that the Court review the first question presented by the petition (*id.* at 13-14, 30-34). The Chamber's concession with respect to *Connell* and its evaluation of the significance of the statutory exemption issue should, we submit, bear heavily on the Court's consideration of whether the decision below should be reviewed. For present purposes, therefore, our disagreement with the Chamber's novel theory concerning that exemption need not be elaborated. We do note, however, that the Chamber's analysis of the "self-interest" test of *Hutcheson* is wholly without basis in this Court's decisions; the Chamber plainly misinterprets *Meat Cutters v. Jewel Tea*, 381 U.S. 676 and *Connell* because in both cases the issue decided was the legality of an *agreement* between the union and an employer, and therefore turned on the scope of what *Connell*, describes as the "non-statutory exemption." See especially *Jewel Tea*, 381 U.S. at 688 and *Connell*, 421 U.S. at 619.

II.

The second question presented by the petition challenges the legal standard followed by the court of appeals in reinstating Count II despite the district court's decision that plaintiffs had not presented evidence of a conspiracy between the unions and certain contractors sufficient to withstand the defendants' motion for summary judgment. Altemose acknowledges that in so ruling the court of appeals adopted the standard that the court had employed in the *Matsushita* case, wherein this Court has agreed to decide whether that standard imposes too heavy a burden on defendants who oppose summary judgment in antitrust conspiracy cases.[2] Altemose's defense of that standard confirms that the legal issue here is the same as that in *Matsushita*. In both cases the defendants/petitioners have urged that the court of appeals erred in failing to follow the teachings of *Cities Service*,[3] and *Monsanto*,[4] whereupon the plaintiff/respondents have countered by invoking the authority of *Continental Ore Co. v. Union Carbide*, 370 U.S. 690, 698-699 to protest against "compartmentalizing" their evidence of conspiracy. Compare Alt. Br. 6 with Brief for Respondents in Opposition, *Matsushita*, No. 83-2004 at 16-18.

Given Altemose's reliance on *Continental Ore*, we deem it appropriate to state briefly why that decision provides no basis for failing to heed the requirements of *Cities Service*. *Continental Ore* directs the courts to consider *all evidence which supports an inference of conspiracy* without determining whether any individual item of evidence is alone sufficient to enable the plaintiff to meet his burden of proof that a conspiracy exists. *Cities Service*

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[2] *Matsushita Electric Industrial Co., Ltd. v. Zenith Radio Corp.*, No. 83-2004, *cert. granted* April 1, 1985, to review *In re Japanese Electronic Products*, 723 F.2d 238 (C.A. 3).

[3] *First National Bank of Arizona v. Cities Service Co.*, 391 U.S. 253.

[4] *Monsanto Co. v. Spray-Rite Service Corp.*, —— U.S. ——, 104 S.Ct. 1464 (Mar. 20, 1984).

adds that the courts *may not infer a conspiracy from such evidence* if "the inference that [the defendant's conduct] was the product of factors other than conspiracy is at least equal to the inference that it was due to the conspiracy, thus negating the probative force of the evidence showing such a failure." (*Id.* at 280, see Pet. 18.)[5]

The *Cities Service* rule avoids unnecessary trials in accordance with the purpose of F. R. Civ. P. 56, and also protects unilateral conduct which the antitrust laws permit. As the United States has observed in *Matsushita*: "The *Cities Service* rule safeguards against the possibility that parallel behavior manifesting only the workings of a competitive market might be deemed illegal, an outcome that 'could deter or penalize perfectly legitimate conduct.' *Monsanto Co. v. Spray-Rite Service Corp.*, No. 82-914 (Mar. 20, 1985), slip op. 8."[6]

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[5] Altemose erects a straw man by insisting that no "decision of this Court requires Altemose on a motion for summary judgment *to establish conclusively* that the co-conspirators were not acting independently." (Alt. Br. 9, citing *Cities Service*, 391 U.S. at 298-299). We of course do not seek to impose such a burden on plaintiffs. But Altemose disregards what the *Cities Service* court said in continuing the very sentence to which Altemose refers: "rather, all that is required is that sufficient evidence supporting the claimed factual dispute be shown to require a jury or judge to resolve the parties' differing versions of the truth at trial." (*Id.*) The discussion in *Cities Service* quoted above in the text establishes what kind of evidence is *not* "sufficient" for that purpose. Accordingly, Altemose errs in contending—and the court of appeals erred in deciding—that "all that is necessary * * * is evidence *tending to show* the absence of independent action." (Alt. Br. 9). And while, as Altemose says, "[W]hether one logical inference from a given set of facts is *more plausible than another* should not * * * be decided on summary judgment but by the ultimate trier of fact" (*id.*), *Cities Service* teaches that the court *must* decide on summary judgment whether the "logical inference" of a conspiracy on the summary judgment record *is at least equally* as plausible as the opposing inference, for, if the evidence is not, the plaintiff is not entitled to present his conspiracy claim to the "trier of fact."

[6] Brief for the United States as Amicus Curiae Supporting Petitioners, No. 83-2004, at 10.

The prudential concerns underlying *Monsanto* have special force in antitrust suits against labor unions, for, if an inference of union-employee conspiracy may be drawn from evidence which is at least equally probative of unilateral conduct, the labor exemption to the antitrust law stated in the Clayton and LaGuardia Acts will be easily eroded (see Pet. 11), and unions will be subject to antitrust sanctions because the unions have, in accordance with the national labor policy, entered into lawful collective bargaining agreements with employers (*id.* 24). The present context thus provides added insights into the deficiencies of the Third Circuit's legal standard, warranting joint consideration of this case with *Matsushita*.

Altemose's charge that we seek a further review of the summary judgment record by this Court (Alt. Br. 7) is without substance. The second question presented is addressed squarely and solely to the soundness of the legal standard employed by the Third Circuit in evaluating that evidence. Moreover, while Altemose asserts "that the evidence demonstrates activities consistent with a concerted action to obtain a result forbidden by the antitrust laws and wholly inconsistent with lawful independent activity" (Alt. Br. 7), the company totally ignores the discussion of the evidence at Pet. 20-22 which shows that each item of "circumstantial evidence" relied on by the court of appeals is at least equally susceptible to the inference that the defendant unions were acting unilaterally.[7] Under the current legal standard—that which

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[7] What Altemose refers to as the "prime example" is "evidence from which it could be found that the Council promised that if Altemose signed a building trades agreement, the Council would send it unionized companies that would finish its jobs at prices lower than that bid by sub-contractors." (App. 9a.) (The court below did not find, as Altemose says, that these would be "non-union contract prices" (Alt. Br. 8), a meaningless concept, since the union does not establish *any* price for construction contracts.) Altemose merely reiterates that this evidence "is highly probative" of a conspiracy. But that is insufficient for Altemose's purpose

is established in *Cities Service*—that evidence is therefore insufficient to defeat the defendant's motion for summary judgment.

III.

The decision of the court below that the charging party in an unfair labor practice case before the National Labor Relations Board may in a civil action relitigate an issue which had been decided by the Board is now in conflict with the decisions of three other circuits. Four days before the petition for certiorari was filed (but too late to come to counsel's attention) the Seventh Circuit joined the Fifth and Sixth in holding that the charging party may *not* do so. *Frye v. United Steel Workers of America*, 767 F.2d 1216 (July 11, 1985). The Seventh Circuit so ruled on the basis of a thorough analysis of the collateral estoppel effect of administrative agency decisions under *United States v. Utah Construction Co.*, 384 U.S. 394. The *Frye* decision reinforces the desirability of resolving the conflict in the circuits on this recurring issue on which the court below stands alone.

In denying that there is a conflict among the circuits on this issue, Altemose asserts that there are factual differences between the present case and those of the Fifth and Sixth Circuits which were discussed at pp. 25-26 of the petition. (Alt. Br. 11-12). Once again, the company's effort to confine the decision below to its facts must fail because the Third Circuit's ruling is not based on any factual peculiarities of this case but on a general legal principle; *viz.*, that court's view that a Board decision cannot have a preclusive effect against a charging party. This is elsewhere acknowledged by Altemose: "The Third Circuit's decision in this case denied the application of collateral estoppel based on due process constraints since

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because the union's strong interest in securing work for its members demonstrates that an inference of unilateral union conduct is at least equally rational. See Pet. 22.

Altemose did not control its destiny in the NLRB proceedings." (Alt. Br. 12). Altemose enjoyed no less (and no more) control of the Board proceedings than did the charging parties which the Fifth, Sixth and Seventh Circuits held were estopped by Board decisions.

Altemose's assertion that "the positions of the General Counsel and Altemose were not the same * * *" (Alt. Br. 12, n.9) is grossly misleading, because on the only issue on which estoppel is sought (the union's objective in picketing in 1975) their positions were identical. Altemose does not state that the company was prejudiced by anything that the General Counsel did or failed to do in litigating *that* issue; nor could Altemose do so, since on that issue the company (and the General Counsel) prevailed before the Board, which found an organizational purpose, as both alleged.

Altemose makes the additional point that the NLRB decision only involved picketing during the first four months of 1975, whereas the complaint herein covers conduct beginning in 1971 and continuing after that period (Alt. Br. 10). This circumstance of course does not affect the public importance of the collateral estoppel issue, which, indeed, Altemose does not dispute. Nor does it deprive that issue of significance in the present litigation if Count II of the complaint is otherwise sustained despite our submission on the statutory exemption question. That the events in those four months are not "unimportant" (*id.*) to Altemose's case is evidenced by the references at Alt. Br. 3 to the testimony at R. 633-665 which is addressed to the picketing which was the subject of the NLRB proceeding. Moreover, the finding concerning the object of the defendants picketing in those months would give rise to an inference that the object was the same before and after, that is, throughout the period covered by the complaint.

The Chamber observes that it cannot be estopped because it was not a party to the NLRB proceeding (COC

Mem. 15). This objection was anticipated at Pet. 25, n.13 where we explain that in the event of a remand the Chamber's complaint may be subject to dismissal on other grounds, so that the question whether Altemose is estopped by the NLRB decision is "fundamental to the further conduct of th[is] case", *United States v. General Motors*, 323 U.S. 373, 377. To this the Chamber and Altemose venture no response.

CONCLUSION

For the reasons stated in the petition for a writ of certiorari and in this reply brief the petition should be granted.

Respectfully submitted,

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